Supreme Court, U.S.
FILED
OCT 18 2000
CLERK

No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed: April 12, 2000
Certiorari Granted: September 8, 2000

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ALL USA V. DANIELS

DATE	DOCKET NO.	DISPOSITION
12/10/93	1	INDICTMENT counts filed against Earthy D Daniels (1) COUNT(S) 1 filed by Daniel S. Goodman (rm) [Entry date 12/13/93]
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11/12/98	122	ORDER filed by Judge William M. Byrne Jr. as to Earthy D Daniels: denying motion to vacate, set aside or correct sent by a person in fed cust, 28:2255 [109-1] (cc: all counsel) [Entered 11/17/98] (step) [Entry date 11/17/98]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALFORNIA
October 1993 Grand Jury

UNITED STATES OF AMERICA,	)	CR-93-1042
Plaintiff,	)	**INDICTMENT**
v.	)	[18 U.S.C. § 9229(g)(1): Felon in Possession of a Firearm; 18 U.S.C. § 924(d)(1): Forfeiture of Firearm]
EARTHY D. DANIELS,	)	
Defendant.	)	

(Filed Dec. 10, 1993)

The Grand Jury charges:

[18 U.S.C. § 922(g) (1), § 924(d) (1)]

On or about October 11, 1992, in Los Angeles County, within the Central District of California, defendant EARTHY D. DANIELS, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed a firearm, that is, a Walther, Model PP, 7.65 mm semi-automatic pistol, serial number 387996, which had been shipped and transported in interstate and foreign commerce.

The Grand Jury further alleges that the above-mentioned firearm is subject to forfeiture.

A TRUE BILL

/s/ _____
Foreperson

TERREE A. BOWERS
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
DAVID C. SCHEPER
Assistant United States Attorney
Chief, Major Crime Section

NORA M. MANELLA
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Telephone: (213) 894-4667
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, Defendant.	NO. CR 93-1042-WMB *NOTICE OF INTENTION TO SEEK ENHANCED PENALTIES PURSUANT TO 18 U.S.C. § 924(e) (1)* (Filed Jan. 18, 1994)

Plaintiff, United States of America, hereby gives notice that, in the event that defendant Earthy D. Daniels ("defendant") is convicted of the crime charged in the Indictment, the United States will contend that he should be sentenced pursuant to 18 U.S.C. § 924(e).

The United States' intent to seek a sentence under section 924(e) is predicated on defendant's prior convictions for three or more violent felonies and/or serious drug offenses, including but not limited to the following: his conviction on or about March 2, 1978, in Los Angeles Superior Court for robbery in violation of California Penal Code section 211; his conviction on or about November 5, 1979, in Los Angeles Superior Court for first degree burglary in violation of California Penal Code section 459; and his conviction on or about November 6, 1981, in Los Angeles Superior Court for robbery in violation of California Penal Code section 211.

DATED: January 18, 1994

Respectfully submitted,
NORA M. MANELLA
United States Attorney
RICHARD E. DROOYAN
Assistant United States Attorney
Chief, Criminal Division
/s/ Daniel S. Goodman
DANIEL S. GOODMAN
Assistant United States Attorney
Public Corruption & Government
Fraud Section
Attorneys for Plaintiff United
States of America

CERTIFICATE OF SERVICE BY HAND

I, Sharon Sansone, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by hand described in this Certificate was made; that on January 18, 1994, I hand delivered, in the above-entitled action, a copy of:

NOTICE OF INTENTION TO SEEK ENHANCED PENALTIES PURSUANT TO 18 U.S.C. § 924(e) (1)

Addressed to:

CARLTON F. GUNN, SDFP
Office of Federal Public Defender
1503 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

This certificate is executed on January 18, 1994 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Sharon Sansone
Sharon Sansone

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, JR., Defendant.	NO. CR 93-1042-WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SENTENCE (Filed Jan. 20, 1995)

The court, having considered the various pleadings filed by the parties regarding the sentence to be imposed in this matter and having considered the arguments of counsel at the sentencing hearings on June 28, 1994, January 10, 1995, and January 11, 1995, hereby makes the following findings of fact and conclusions of law regarding the sentence imposed.

1. The government has sought an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). A defendant who has been convicted of being a felon in possession of a firearm is subject to a mandatory minimum sentence of fifteen years in prison and a maximum sentence of life in prison if he is found to have three prior convictions for either a "violent felony" or "serious drug offense", or both, as those terms are defined in the Act. *See* 18 U.S.C. § 924(e). A defendant who is convicted or being a felon in possession of a firearm and is not found to be an armed career criminal is subject to a maximum prison sentence of ten years and no mandatory minimum sentence. *See* 18 U.S.C. § 924(a)(2). Defendant

has contested the government's claim that he should be found to be an armed career criminal and has argued that he is therefore subject only to the maximum sentence of ten years imprisonment.

2. The parties also dispute the application of certain Sentencing Guidelines factors. The government has sought a two-level upward adjustment for "obstruction of justice", pursuant to Section 3C1.1 of the Sentencing Guidelines. Defendant has sought a two-level or three-level downward adjustment for "acceptance of responsibility", pursuant to Section 3E1.1. The parties also disagree whether the Armed Career Criminal guideline applies. That guideline must be applied by the court if it finds the defendant to be an armed career criminal under 18 U.S.C. § 924(e). *See* U.S.S.G. § 4B1.4.

3. Defendant has also sought downward departures on two cases: (1) to reflect the year in prison that defendant has already served, and (2) on the ground that the offense conduct differs from that of a typical defendant prosecuted under the Armed Career Criminal Act. Lastly, defendant argues that the mandatory minimum sentence of 15 years contained in 18 U.S.C. § 924(e) refers to *combined* federal and state imprisonment and so includes the one year he served in state custody for his state conviction arising out of the same conduct.

ACCEPTANCE OF RESPONSIBILITY/
OBSTRUCTION OF JUSTICE.

A. OBSTRUCTION OF JUSTICE.

4. The government claims an adjustment for obstruction of justice is justified by defendant's testimony at the hearing on his motion to suppress evidence. *See* Government's Position With Respect to Sentencing Factors, at 2-3. At that hearing, defendant testified that he had his hand with the gun in the front pocket of his sweatshirt and did not withdraw the gun from his pocket until after he had run through a hole in a wrought iron fence and been told to freeze by police officers. The officers who arrested defendant testified that he already had the gun out of his pocket when defendant ran through the hole in the fence. This court found at the suppression hearing that defendant's testimony was not credible. *See* Court's Findings of Fact and Conclusions of Law filed March 23, 1994, Finding of Fact 11.

5. The court finds that the two-level upward adjustment for obstruction of justice should not be made under Section 3C1.1 of the Sentencing Guidelines, however. This adjustment applies only to testimony a court finds to be willful perjury, not testimony which is merely inaccurate. *United States v. Dunnigan*, 113 S.Ct. 111, 1116-17 (1993). The commentary to Section 3C1.1 indicates that inaccurate testimony "should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment (n. 1).

6. While the court did find that defendant's testimony was not credible, this did not constitute a finding that defendant lied, as opposed to simply being mistaken or having a faulty memory. The incident which defendant

and the officers testified about happened quickly, in the dark of night, while defendant was in a rush to escape. The difference between the officer's testimony and defendant's testimony is a matter of a few inches – whether his hand with the gun in it was still inside his pocket or whether it had been pulled out at some point while defendant was running or as he ducked to go through the hole in the fence. Defendant could have been unaware that he had taken his hand out of his pocket and/or forgotten this when he testified about it more than a year later.

B. ACCEPTANCE OF RESPONSIBILITY.

7. The government has argued against an adjustment for acceptance of responsibility based on the fact that defendant went to trial and contested factual guilt, in the form of argument by defense counsel that the officers were lying and framed him with a back up gun. *See* Government's Response to Defendant's Position with Respect to Sentencing Factors, at 3, 7-10. The government also argues that defendant's statements to the probation office and the court do not clearly demonstrate an acceptance of responsibility. *See id.* at 5-7. Defendant, on the other hand, argues that he is entitled to credit of acceptance of responsibility based on his plea of guilty to an identical offense in state court, his offer to plead guilty in this case, his authorship of a letter to the court admitting his guilt and expressing remorse even prior to trial, and his admission of guilt in an interview with the probation officer. *See* Defendant's Position Re: Sentencing Factors in

Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 12-13.

8. Section 3E.1 of the Sentencing Guidelines "authorizes reductions in sentences of defendants who are tried *as well as* of those who plead guilty." *United States v. Gonzalez*, 897 F.2d 1018 (9th Cir. 1990) (emphasis in original). "[A] defendant may not be denied the reduction solely on the basis that he chose to exercise his Sixth Amendment Right to go to trial." *United States v. Molina*, 934 F.2d 1440, 1450 n.12 (9th Cir. 1991). A defendant can receive credit for acceptance of responsibility even where defense counsel argues a defense theory which is entirely inconsistent with guilt, *see, e.g., United States v. Armijo*, 5 F.3d 1229, 1232, 1236 (9th Cir. 1993), and even when the defendant has actually testified and claimed an affirmative defense, *see United States v. Johnson*, 956 F.2d 894, 903-05 (9th Cir. 1992). While it is the "unusual case[ ]" in which a defendant who has gone to trial is able to demonstrate that he had accepted responsibility, it is possible. *See United States v. McKinney*, 15 F.3d 849, 852 (9th Cir. 1994).

9. The court finds that defendant is entitled to a two-level downward adjustment for acceptance of responsibility in this case. The court finds that this is one of those unusual cases in which a defendant who goes to trial can receive credit for acceptance of responsibility. The court is particularly influenced by the fact that defendant entered a timely plea of guilty to an identical offense in state court. This, in addition to defendant's admissions in his letter to this court and the interview with the probation officer, are sufficient to establish that he has accepted responsibility for his conduct.

10. The court rejects defendant's argument that he should receive an additional one-level adjustment under Section 3E1.1(b) of the guidelines. The defendant's guilty plea in state court and whatever statements he made at the time he was caught red-handed with a firearm do not constitute "timely providing complete information to the government concerning his own involvement in the offense" within the meaning of § 3E1.1(b)(1). Section 3E1.1(b)(2) is inapplicable because defendant did not plead guilty in the federal case but instead proceeded to trial.

OFFENSE LEVEL AND GUIDELINE RANGE PRIOR TO APPLICATION OF ARMED CAREER CRIMINAL ACT AND ARMED CAREER CRIMINAL GUIDELINE.

11. Based on the above findings, the court finds that defendant's offense level, criminal history category, and guideline range would be 22, VI, and 84-105 months, respectively, if the Armed Career Criminal Act and Armed Career Criminal Guideline did not apply. The court arrives at the offense level of 22 by finding the base offense level to be 24, pursuant to Section 2K2.1(a)(2) of the guidelines and than reducing that offense level by two for acceptance of responsibility, pursuant to Section 3E1.1(a), *see* supra. par. 8. The court finds that there should not be a two-level increase in the offense level based on a finding that the firearm defendant possessed was stolen, *see* 2K2.1(b)(4), because the government has conceded it is unable to prove that the firearm in question was stolen.

ARMED CAREER CRIMINAL ACT AND ARMED CAREER CRIMINAL GUIDELINE

12. In support of its claim that the Armed Career Criminal Act and Armed Career Criminal Guideline are applicable, the government has offered evidence of five prior "convictions". Two are the adult convictions for robbery which are described in paragraphs 53 and 64 of the presentence report. Two others are the first degree burglary convictions which are described in paragraphs 57 and 61 of the presentence report. The fifth is the 1975 juvenile adjudication described in paragraph 41 of the presentence report.

13. Defendant concedes that the two robbery convictions are "violent felonies" within the meaning of the Armed Career Criminal Act, though he has indicated that those prior convictions may be subject to a constitutional challenge which cannot be raised in this sentencing proceeding, *see Custis v. United States*, 114 S.Ct. 1732 (1994). Defendant argues that the two residential burglary convictions are not "violent felonies" within the Armed Career Criminal Act definition, however. *See* Defendant's Position re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 17-24. With respect to the juvenile adjudication, defendant argues, *inter alia*, that (1) he was not in fact "convicted" because the allegation in question was dismissed, (2) the allegation did not allege burglary or any other crime under California law, and (3) the allegation does not come within the more strict Armed Career Criminal Act requirements for consideration of juvenile adjudications, *see* 18 U.S.C. § 924(e)(2)(B). *See* Defendant's Position with Respect to Sentencing Factors and Response

to Government's Position with Respect to Sentencing Factors *Under Seal*, at 3-7, 24-29.

14. The court finds that defendant was convicted as an adult of robbery in 1978 and 1981 and was convicted of first degree burglary under California law in 1977 and 1979.

15. The court finds that the two robberies are "violent felonies" within the Armed Career Criminal Act definition. This is not contested by defendant, as noted supra par. 13.

16. The court also finds that the two residential burglary convictions in 1977 and 1979 are "violent felonies" within the Armed Career Criminal Act definition. The information, complaint, and plea documents in those cases demonstrate that the burglary charges to which defendant pleaded guilty in state court fall within the definition of burglary enunciated in *Taylor v. United States*, 495 U.S. 575, 599 (1990), namely, the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

17. Because the court finds that defendant is an Armed Career Criminal under 18 U.S.C. § 924(e) based upon his 1978 and 1981 robbery convictions and his 1977 and 1979 burglary convictions, the question of whether defendant's 1975 adjudication is an Armed Career Criminal Act predicate is moot. If this issue were not moot, the court finds that the government has not established that the juvenile "burglary" allegation was in fact sustained and found to be true. The petition was in two counts. Count one alleged a breaking into the defendant's mother's house. (P.C. 459). The records which have been

provided are sparse and ambiguous. The order of the juvenile court includes a sentencing form reading: "The petition filed ___ as to Paragraph(s) ___ is ___ true, and the petition is sustained, except that Paragraph(s) 1 is dismissed in the interest of justice." Government's Position With Respect to Sentencing Factors, Exhibit 5, at 3. While the box beside that sentence is not checked, there is the number "1" written in the blank preceding the words "is dismissed in the interest of justice." While the next sentence on the form is completed to read, "The petition filed 1-16-75 is true and sustained," and has the box beside it checked, the document is at least internally contradictory. The court is therefore unable to find that this allegation of the burglary was in fact sustained.

18. Based on the court's finding that defendant has four prior convictions for "violent felonies" within the Armed Career Criminal Act definition, the court finds that defendant is subject to sentencing under the Armed Career Criminal Act. This means that defendant's guideline range must be determined under the Armed Career Criminal Guideline. *See* U.S.S.G. § 4B1.4. Under that guideline, defendant's offense level is 33 less any adjustment for acceptance of responsibility. *See* U.S.S.G. § 4B1.4(b)(3)(B). Since the court has found there should be a two-level adjustment for acceptance of responsibility, defendant's adjusted offense level under this guideline is 31. Taken in conjunction with defendant's criminal history category of VI, his guideline range under the Armed Career Criminal Act Guideline is 188-235 months.

19. Defendant argues that a downward departure is appropriate because his offense conduct differs from that of a typical defendant intended to be prosecuted under

the Armed Career Criminal Act. He argues that he is eligible for such a departure because he merely possessed and did not use the firearm. The court rejects this argument because the statute on its face reaches all qualifying felons who possess guns and because the factor suggested by defendant has been incorporated into the Sentencing Guidelines. *See* U.S.S.G. § 4B1.4(b)(3).

20. Defendant has argued that the court should depart 12 months downward from this guideline range on the ground that he served 12 months in state custody for an identical offense. *See* Defendant's Position re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 30. The government has stated that it does not oppose the court's giving the defendant a sentence that is 12 months lower than it otherwise would have, to take account of the time defendant served in state custody for his state conviction for the same act. *See* Government's Position with Respect to Sentencing Factors, at 9-10. The government has stated that if the court intends to sentence defendant at the bottom of the guideline range, it does not oppose a 12-month downward departure to account for the time in state custody. *See id.* The probation office has also recognized this as a potential ground for departure. The court agrees that a 12-month downward departure on this ground is appropriate, which would result in a sentence of 176 months.

21. Any statutory mandatory minimum sentence overrides the guideline range. *See United States v. Sharp*, 883 F.2d 829 (9th Cir. 1989). The government has taken the position that the Armed Career Criminal Act requires a mandatory minimum *federal* sentence of 15 years, and, if

this were so, the court would not be able to sentence defendant to anything less than 180 months. The defense, however, citing *United States v. Kiefer*, 20 F.3d 874 (8th Cir. 1994), takes the position that the 15-year mandatory minimum sentence required by the Armed Career Criminal Act is 15 years in total federal and state custody for the defendant's possession of the firearm. *See* Defendant's Supplemental Position re: Sentencing Factors.

22. This court adopts the reasoning of *Kiefer*, at least in the circumstances of this case, where the defendant was convicted in state court of the identical felon-in-possession of a firearm offense for which he has been convicted in federal court. The statutory language in the Armed Career Criminal Act requires that a defendant who is an armed career criminal "shall be . . . imprisoned not less than fifteen years," 18 U.S.C. § 924(e)(1), and does not indicate whether the word "imprisoned" refers to federal imprisonment alone or the total of federal and state imprisonment. The court agrees with the conclusion of the *Kiefer* court "that there would be no violation of the plain language of § 924(e)(1), and . . . various sentencing statutes would be properly harmonized, if § 924(e)(1) were construed to permit the sentencing court to give [the defendant] a . . . reduced federal sentence." *Kiefer*, 20 F.2d at 876. While the *Kiefer* court describes this is a form of "credit", *see id.*, it is not so much the giving of credit – which would arguably be inconsistent with *United States v. Wilson*, 112 S. Ct. 1351 (1992) – as it is a construction of the mandatory minimum sentence provision of 18 U.S.C. § 924(e).

23. Mr. DANIELS served one year in state custody for his possession of a firearm. Under *Kiefer*, this makes

the mandatory minimum *federal* sentence 14 years, *i.e.*, the mandatory minimum *total* sentence of 15 years less the one year served in state custody.

SENTENCE

24. In sum, the court finds there to be a mandatory minimum *federal* sentence of 14 years, finds the Guideline Range to be 188-235 months, and exercises its discretion to depart downward to 176 months, based on the time Mr. Daniels has already served in state custody. In conjunction with this custody sentence, the court imposes a five-year term of supervised release with the conditions orally announced at the January 11, 1995 sentencing hearing. The court finds that due to the defendant's inability to pay a fine, there should be no fine imposed, but does impose the $50 special assessment which is statutorily required. The court further orders that the firearm be forfeited to the government.

DATED: Jan 20, 1995 /s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States
District Judge

CERTIFICATE OF SERVICE

I, *Sandy Ear*, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney,

United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of California, at whose direction the service by hand delivery described in this Certificate was made; that on *March 5, 1998*, I delivered in the above-entitled action, in an envelope, a copy of: **GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBIT**

addressed to: Sylvia Torres-Guillen
Deputy Federal Public Defender
U.S. Courthouse, Suite 1503
312 North Spring Street
Los Angeles, CA 90012

at her last known address.

This Certificate is executed on *March 5, 1998*, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Sandy Ear
SANDY EAR

MARIA E. STRATTON
Federal Public Defender
SYLVIA TORRES-GUILLEN

NAME Deputy Federal Public Defender
Suite 1503, United States Courthouse

312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 894-4740

(ADDRESS or PLACE OF CONFINEMENT and PRISON NUMBER)
NOTE: *If represented by an attorney, his name, address and telephone number*

(Filed Jan. 16, 1998)

United States District Court
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	CASE NO. 98-0420 WMB (CR93-1042-WMB)
v.	
EARTHY D. DANIELS	(To be supplied by the Clerk of the U.S. District Court)
Full name of movant (include name under which you were convicted)	MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY
	28 U.S.C. § 2255

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

INSTRUCTIONS AND INFORMATION –
READ CAREFULLY

This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

Additional pages are not permitted. No citation or authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each judgment.

Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is: 312 N. Spring St., Los Angeles, Ca 90012

ATTN: Intake/Docket Section

Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court, Central District of California, Los Angeles, California

2. Date of judgment of conviction 1/11/95

3. Length of sentence 176 months Sentencing Judge Hon. Wm. Matthew Byrne

4. Nature of offense or offenses for which you were convicted 18 USC § 922(g)(1)

5. What was your plea? (Check one)

   (a) Not guilty (X)
   (b) Guilty ( )
   (c) Nolo Contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details _____

6. Kind of trial: (Check one)

   (a) Jury (X)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (X)

8. Did you appeal from the judgment of conviction? Yes (X) No_( )

9. If you did appeal, answer the following:

   (a) Name of Court U.S. Court of Appeals, Ninth Circuit, Supreme Court

   (b) Result Affirmed by Ninth Circuit; Certiorari denied by Supreme Court

   (c) Date of Result Ninth Cir. affirmance on 6/3/96; denial of certiorari on 1/21/97.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes ( ) No (X)

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court _____

    (2) Nature of proceeding _____

    (3) Grounds raised _____

    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

    (5) Result _____

    (6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you *did not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two:

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing THERE WAS NO PRELIMINARY HEARING.

(b) At arraignment and plea CARL F. GUNN and SYLVIA TORRES-GUILLEN, Deputy Federal Public Defenders. Office of the Federal Public Defender, L.A., [illegible]

(c) At trial same

(d) At sentencing same

(e) On appeal same

(f) In any post-conviction proceeding not applicable

(g) On appeal from any adverse ruling in a post-conviction proceeding not applicable

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at approximately the same time?
Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: _

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed sentence to be served in the future?

Yes ( ) No ( )

WHEREFORE, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

/s/ Sylvia Torres-Guillen
Signature of Attorney (if any)

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on 1-13-98
(Date)

/s/ Earthy Daniels
Signature of Movant

EARTHY D. DANIELS
(Petitioner)

UNITED STATES OF AMERICA
(Respondent[s])

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, EATHY D. DANIELS, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed?
Yes ____ No X

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

1-2-94 160 a month G.P.

2. Have you received, within the past twelve months, any money from any of the following sources?

a. Business, profession or form of self-employment?
Yes ____ No X

b. Rent payments, interest or dividends?
Yes ____ No X

c. Pensions, annuities or life insurance payments?
Yes ____ No X

d. Gifts or inheritances?
Yes ____ No X

e. Any other sources?
Yes ____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?

Yes ____ No X

(Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is yes, describe the property and state its approximate value. _____.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. none

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on 1-15-98
(Date)

/s/ Earthy Daniels
Signature of Movant

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined, I further certify that Petitioner likewise has the following securities to his credit according to the records of said _____ institution: _____

_____
Authorized Officer of Institution

_____
Title of Officer

_____

28 U.S. CODE, SEC. 2255

§ 2255. Federal Custody: remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show the the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. As amended May 24, 1949, c. 139, § 114, 63 Stat. 105.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On April 20, 1994, Earthy D. Daniels, Jr., was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The government sought an enhanced sentence under the Armed Career Criminal Act, which is codified in 18 U.S.C. § 924(e). The prior adult convictions which the government relied on were two California burglary convictions and two California robbery convictions.

Mr. Daniels argued that he was not an armed career criminal. He argued that the two burglary convictions were not categorically "violent felonies" under the Armed Career Criminal Act. *See* Defendant's Position Re: Sentencing Factors and Response to Government's Position With Respect to Sentencing Factors *Under Seal*, at pages 17-24, filed June 13, 1994. He did not challenge consideration of the robbery convictions on this ground, because such convictions do categorically satisfy the Armed Career Criminal Act definition of "violent felony". *See, e.g., United States v. Alvarez*, 972 F.2d 1000, 1006 (9th Cir. 1992). Mr. Daniels did note that the prior robbery convictions might be constitutionally invalid but recognized that he could not raise that claim at sentencing, in light of the recent Supreme Court decision in *Custis v. United States*, 511 U.S. 485 (1994). *See* Defendant's Position Re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at page 17. The two robbery convictions were a

March 2, 1978 conviction, and a November 6, 1981 conviction.

This Court rejected Mr. Daniels' argument that the burglary convictions were not categorically "violent felonies" and imposed the fifteen-year mandatory minimum sentence required by the Armed Career Criminal Act.[1] *See* Findings of Fact and Conclusions of Law Re: Sentence, at ¶¶ 16-17 and 21-24, filed January 20, 1995. Mr. Daniels thereafter appealed to the United States Court of Appeals for the Ninth Circuit, but that court affirmed this Court's decision on June 3, 1996. *See United States v. Daniels*, 86 F.3d 1164 (9th Cir. 1996) (table). Mr. Daniels then filed a petition for writ of certiorari with the Supreme Court, which was denied on January 21, 1997. *See Daniels v United States*, 117 S.Ct. 773 (1997).

Mr. Daniels now brings his challenge to the use of the prior robbery convictions to enhance his sentence under the Armed Career Criminal Act. While such a challenge was precluded at the original sentencing hearing, it is permitted under 28 U.S.C. § 2255. The Court should hold a hearing and, for the reasons set forth below, find that Mr. Daniels' enhanced Armed Career Criminal Act sentence is constitutionally invalid because it is based on two constitutionally invalid prior convictions.

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[1] Following the Fourth Circuit's decision in *United States v. Kiefer*, 20 F.3d 874 (4th Cir. 1994), the Court reduced Mr. Daniels' federal sentence by the period of time he had served in state custody on a state conviction for the same offense. The actual federal sentence imposed was 176 months.

II.

ARGUMENT

A. THE COURT MUST CONSIDER THE CONSTITUTIONAL VALIDITY OF ANY PRIOR CONVICTION WHICH AFFECTS A SENTENCE CHALLENGED BY A DEFENDANT IN A 28 U.S.C. § 2255 MOTION.

In a line of cases beginning with *Maleng v. Cook*, 490 U.S. 488 (1989), the Supreme Court and Ninth Circuit have recognized that a defendant who is challenging a sentence under 28 U.S.C. § 2255 may challenge the constitutional validity of any prior conviction which enhances or otherwise affects the sentence he is challenging. In *Maleng*, a defendant who had been convicted of robbery in 1958 and been convicted of robbery again in 1978 sought both to directly challenge the constitutional validity of the 1958 conviction and to challenge the enhancement of the 1978 sentence as a result of the 1958 conviction. *See id.* at 489. The Supreme Court held that the defendant could not directly challenge the 1958 conviction because he was no longer "in custody" as a result of that conviction. *See id.* at 491-92. The Court held that the defendant could challenge the 1978 sentence, however. *See id.* at 493.

While the Supreme Court in *Maleng* "express[ed] no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentence which it was used to enhance," *id.* at 494, that issue was addressed by the Ninth Circuit in *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990). In *Feldman*, a habeas petitioner sought to directly attack a prior conviction which

he claimed the United States Parole Commission had used in setting his parole date on a subsequent sentence. *See Feldman*, 902 F.2d at 1447. The Ninth Circuit read *Maleng* as precluding a direct attack on the prior conviction but held that it must construe the defendant's habeas petition "as an attack on petitioner's current federal sentence as enhanced." *Feldman*, 902 F.2d at 1449. The Ninth Circuit then remanded the matter to the district court and ordered that the district court resolve the defendant's claim that the challenged conviction was invalid if the district court determined that the Parole Commission had relied on the conviction. *See Feldman*, 902 F.2d at 1449.

The Supreme Court addressed the question again in *Custis v. United States*, 511 U.S. 485 (1994). While the central holding of *Custis* was that a defendant cannot raise most constitutional challenges to a prior conviction in the sentencing hearing for a new offense, the Court recognized that *Maleng* allows such challenges in federal habeas. *See Custis*, 496 U.S. at 497. The dissenting opinion noted that the Court had left undisturbed "uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." *Id.* at 512 (Souter, J., dissenting).

The Ninth Circuit recognized the *Custis* opinion's reaffirmation of *Maleng* in *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994). In *Brock*, a defendant challenged his confinement under a sexual predator statute because it was based on a prior conviction which he claimed was constitutionally invalid. The court discussed *Maleng*, *Feldman*, and *Custis* and recognized that a defendant could make "an attack on [a prior conviction] *in the context of* an

attack on [a new commitment]," and raise "a challenge to the pending sentence *as enhanced by* the allegedly invalid expired conviction." *Brock*, 31 F.3d at 890 (emphasis in original). The Court recognized that *Custis* had reaffirmed *Maleng* and left *Feldman* controlling. *See Brock*, 31 F.3d at 890, 891.[2]

This Court must therefore consider the constitutional validity of Mr. Daniels' prior robbery convictions. If those convictions are constitutionally invalid, the enhancement of Mr. Daniels' sentence is constitutionally invalid.

B. BOTH OF MR. DANIELS' PRIOR ROBBERY CONVICTIONS ARE CONSTITUTIONALLY INVALID.

1. Because He Did Not Understand The Nature Of The Offense, Mr. Daniels' Guilty Plea In The 1978 Robbery Case Was Not Intelligent And Voluntary And His Conviction Violated The Due Process Clause.

Mr. Daniels was charged in the 1978 robbery case with two other co-defendants. *See* Exhibit A (information). His role was quite limited, however, as indicated by

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[2] The Ninth Circuit did preclude a challenge to a prior conviction which had been used to enhance an Armed Career Criminal Act sentence in *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995). *See id*, at 808-09. While Clawson was appealing the denial of habeas relief under 28 U.S.C. § 2255, neither he nor the court of appeals considered the fact that he was proceeding under § 2255 instead of at an original sentencing hearing. Apparently for that eason, the court ignored both *Brock* and *Custis*'s reaffirmation of *Maleng*. The court did not consider whether a challenge to the constitutional validity of a prior conviction should be treated differently in the context of a § 2255 motion.

the characterization of his conduct at the time he was sentenced.[3] His attorney noted that on the day of trial "the People offered Mr. Daniels immunity because of his minimal involvement" and that that involvement "basically was being in the vehicle at the time the other two co-defendants went up to the telephone booth and robbed the victim." Exhibit B, at 3. The attorney also noted that "[l]iability was somewhat questionable," a claim with which the court appeared to express agreement and with which the prosecutor did not disagree. Exhibit B, at 4.

Mr. Daniels did not understand what was necessary to establish his liability. Mr. Daniels knew that the state would have to prove that he knew about the crime ahead of time and that he was in the car with the other men before they committed the robbery. He did not know then – and does not know today – what, if anything, else the state might have to prove. *See* Declaration of Earthy D. Daniels, par. 5. The main thing Mr. Daniels recalls his attorney talking to him about is the state's willingness to give him immunity if he cooperated against his co-defendants. *See id.*, par 6.

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[3] Defense counsel has not been able to locate a copy of the transcript of the guilty plea; it appears to be missing from the state court file.

a. Mr. Daniels' limited understanding of what the state must prove to convict him of aiding and abetting the robbery fell short of the proof California state law requires.

While the information did not describe Mr. Daniels as an aider and abettor, this was clearly the only possible theory under which he could have been convicted. Under California law, the information need not contain an express aiding and abetting allegation. Mr. Daniels thus could and must have been prosecuted as an aider and abettor. *See* Cal. Penal Code §§ 31, 971. *See also People v. Beeman*, 35 Cal. 3d 547, 554, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("those persons who at common law would have been termed accessories before the fact and principals in the second degree as well as those who actually perpetrate the offense, are to be prosecuted, tried and punished as principals in California").

As under federal law, moreover, mere presence is insufficient to convict a defendant as an aider and abettor. *People v. Durham*, 70 Cal. 2d 171, 181, 74 Cal. Rptr. 262, 449 P.2d 198 (1969). *See also People v. Rodriguez*, 42 Cal. 3d 730, 760-61, 230 Cal. Rptr. 667, 726 P.2d 113 (1986). Rather, the state must prove three elements – that the defendant "acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Beeman*, 35 Cal. 3d at 561.

Mr. Daniels was unaware of the second and third elements. As indicated in his declaration, he knew that the state must prove knowledge and presence but had no idea what else the state must prove. In particular, he did not know that the state had to prove intent in addition to knowledge and what, if any, affirmative act or "advice" it must prove.

Mr. Daniels thus understood neither the requisite mens rea *nor* the need for some affirmative act or advice. He entered his plea without understanding the nature of the offense to which he was pleading guilty.

b. Mr. Daniels' lack of understanding of the nature of the offense made his guilty plea invalid under the Due Process Clause.

A conviction based on a guilty plea which is not intelligent and voluntary violates the Due Process Clause. *See Brady v. United States*, 397 U.S. 742, 748 (1970) *and cases cited therein*. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court for the first time expounded upon what this meant. The Court held that the record of a guilty plea must reflect that the defendant was aware of and voluntarily waived three rights – his privilege against self-incrimination, his right to a trial by jury, and his right to confront witnesses. *See id.* at 243. In addition, the Court held, the record must reflect that the defendant had "a full understanding of what the plea connotes and of its consequences." *Id.* at 244.

One critical aspect of an intelligent and voluntary plea is an "understanding of the essential elements of the

crime charged." *Sober v. Crist*, 644 F.2d 807, 809 (9th Cir. 1981) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). *See also Henderson v. Morgan*, 426 U.S. 637, 647 & n.18 (1976); *Boykin v. Alabama*, 395 U.S. at 243 n.5. When a defendant is not aware of a critical element of the offense, his plea and the related waivers of constitutional rights cannot be intelligent and voluntary because he does not know what the government must prove or what he is admitting.

In *Henderson v. Morgan, supra*, the defendant had precisely such a partial lack of understanding. He admitted that he had killed the victim and so apparently understood that killing was one element of the offense, but he did not understand the additional critical element of intent. *See Henderson*, 426 U.S. at 642-43, 647. *See id.* at 647. For that reason, the Court found, his plea was not intelligent and voluntary.

Mr. Daniels had the same lack of understanding here and more. Like the defendant in *Henderson*, he did not understand the intent which the state would have to prove. Indeed, Mr. Daniels did not even understand what *act* the state would have to prove.

Mr. Daniels' lack of understanding arises in an even more troubling context, moreover. This was a case in which the state had already offered outright dismissal if Mr. Daniels would cooperate by testifying against his codefendants. Apparently everyone involved – the defense attorney, the court, and the prosecutor – recognized the case was weak to start with. This contrasts with the situation in *Henderson v. Morgan, supra*, where the Supreme Court recognized:

> The lawyers were certainly familiar with the intent requirement and evidently were satisfied that the objective evidence available to the prosecutor was sufficiently strong that the requisite intent could be proved beyond a reasonable doubt; accordingly, had this precise issue been discussed with respondent, his lawyers no doubt would have persisted in their advice to plead guilty. It follows that . . . there is no way one can be sure that [the defendant] would have refused to enter the plea following advice expressly including a discussion of the precise question. Indeed, we assume he probably would have pleaded guilty anyway. Such an assumption is, however, an insufficient predicate for a conviction of second-degree murder.

Henderson, 426 U.S. at 644 n. 12.

If such an assumption was insufficient in light of the strong evidence in *Henderson*, it must certainly be insufficient in the case at bar. Where the government's evidence is as weak as its evidence apparently was here, there is even greater reason to reject reliance upon the prior conviction as a basis for a severe enhanced sentence.

2. Mr. Daniels' 1981 Robbery Conviction Cannot Be Relied Upon Because It Was Obtained Through Violation Of Both His Right To Effective Assistance Of Counsel And The Due Process Clause.

Mr. Daniels' 1981 robbery conviction arose out of an incident which took place on September 15, 1981. At approximately 11:15 p.m., a man snatched the purse of Mary Christine Morrison and fled in a car driven by

another man. Exhibit C, at 4-6. A bystander wrote down the license plate number of the car. Exhibit C, at 6.

Investigating officers traced the license plate to a car which had been sold jointly to Mr. Daniels and another man who lived at the same address as Mr. Daniels. *See* Exhibit D. The robber was described by Ms. Morrison as being a black man between 19 and 23 years old, approximately 5'10" tall and weighing 160 pounds with a dark complexion, a medium Afro hair cut, and a dark bulky jacket. Exhibit E. Ms. Morrison gave no description of the driver. *Id.*

The investigating officers thereafter put out a bulletin requesting that the vehicle be stopped by any officers who observed it. Exhibits F, H. The officers discovered that the car had been impounded on September 13, 1981, when police in Montclair, California arrested a man named Robert Johnny Hall for driving under the influence. *See* Exhibit F. The officers were also advised that Mr. Daniels, as one of the owners, had picked the car up on September 15 sometime prior to 4:00 p.m. *See id.*

The investigating officers also conducted a further interview of the victim. *See* Exhibit G. She indicated that the driver was a black man in his early 20's who was "cleanly dressed" and had a dark complexion. *Id.* The officers showed her photos of both Mr. Daniels and Mr. Hall, and she stated that Mr. Daniels was "definitely not" the robber and said only that he "could have been" the driver. *Id.*

Six days after the robbery, the car was stopped by California Highway Patrol Officers in the San Dimas area. Exhibit H. The investigating officer was notified that the

vehicle had been stopped and that it was occupied by Mr. Daniels, Mr. Hall, and two Caucasian men. Exhibit C, at 16-17. The investigating officer then requested that Mr. Daniels and Mr. Hall be arrested. Exhibit H. Mr. Daniels was then transported to the Inglewood Police Department, where he confessed to being the driver of the getaway car. Exhibit C, at 22-23.

This confession and evidence that a robbery had been committed were all that was offered at the preliminary hearing. *See* Exhibit C. The Commissioner found probable cause and Mr. Daniels was held to answer in the Superior Court. *See id.* at 30. He later pled guilty. His attorney never advised him that he could file a motion seeking to suppress the confession as the product of an illegal arrest, and he would have asked his attorney to file such a motion if he had known it was possible. *See* Declaration of Earthy D. Daniels, par. 10.

a. Mr. Daniels, confession was subject to suppression as the fruit of an unlawful arrest because he was arrested without probable cause, in violation of the Fourth Amendment.

One must begin with the premise that mere presence at or association with a place or a vehicle involved in an offense is not sufficient to create probable cause. *See United States v. Di Re*, 323 U.S. 581, 586-87 (1948); *cf. Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("a person's mere propinquity to others individually suspected of criminal activity does not, without more, give rise to probable cause to search that person"). *See also United States v.*

Soyland, 3 F.3d 1312, 1314 (9th Cir. 1993); *People v. Shelton*, 60 Cal. 2d 740, 745, 388 P.2d 655, 36 Cal. Rptr. 433 (1964). One who merely happens to be driving a car six days after it was used in a robbery thus cannot be arrested for the robbery. *Cf. United States v. Arias*, 923 F.2d 1387, 1390 (9th Cir.), *cert. denied*, 502 U.S. 840 (1991) (fact that defendant was driving car with drugs in trunk established probable cause *when considered in conjunction with* defendant's link to other drug suspects, suspicious driving and interaction with one of other suspects, and informant's prior warning that drug transaction would be taking place).

While Mr. Daniels was the owner of the car involved in the 1981 robbery, ownership also is insufficient. The Ninth Circuit has suggested that ownership of property involved in a crime is insufficient by itself, even in the case of real property. *See United States v. Alexander*, 761 F.2d 1294, 1303 (9th Cir. 1985) (probable cause established by ownership *in conjunction with* defendant's proximity to cocaine processing shed and presence of small amount of cocaine in trailer defendant was in). Ownership is even weaker evidence in the context of a vehicle, which can easily be borrowed by others, as Mr. Daniels' vehicle was. Ownership is weaker evidence still when the vehicle is jointly owned by – and, presumably, driven by – two men who both live at the same address.

The California Court of Appeals implicitly recognized the insufficiency of ownership alone when it described ownership *and* several other factors as "circumstances short of probable cause to arrest" in *People v. Herrera*, 52 Cal. App. 3d 177, 124 Cal. Rptr. 725 (1975). *See id.* at 181. *Herrera* can be contrasted with *United States v.*

Gaines, 563 F.2d 1352 (9th Cir. 1977), where the court found probable cause to arrest the driver of a vehicle when the officers also knew that the defendant was the only man who had driven the vehicle during the prior month and he and his passenger matched the description of the two men who had committed the robbery. *See id.* at 1357-58.[4] *Herrera* can also be contrasted with *dictum* in *Kraus v. County of Pierce*, 793 F.2d 1105 (9th Cir. 1986), where the court suggested that there would have been probable cause to arrest the owner of a car and his companion when the robbery had just been committed and the car's engine was still warm. *See id.* at 1107, 1109.[5]

The question in the present case must therefore be what more exists here. The most significant additional factor is one that actually *detracts* from probable cause, *viz.*, the multiple users of the vehicle. The car was *jointly* owned by Mr. Daniels and another man who lived at the same address and thus apparently had equal access to the vehicle. The car was apparently also loaned out on occasion, as evidenced by the fact that Mr. Hall was actually driving it two days earlier when he was arrested. Mr.

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[4] The Ninth Circuit cited *Herrera* with approval in *Gaines*, albeit for its holding that the circumstances which fell short of probable cause did establish reasonable suspicion justifying an investigative detention. *See Gaines* 563 F.2d at 1357.

[5] The court in *Kraus* found a lack of probable cause on the actual facts because the car had not been definitively tied to the robbery. The court simply noted: "The officers would have had probable cause to arrest [the plaintiffs] if they had information linking them or their car to the crime scene." *Id.* at 1109. The officers in *Kraus* appeared to have arrived within minutes of the robbery, however. *See id.* at 1107.

Daniels was therefore just one of several individuals who drove the car. *Compare United States v. Gaines*, 563 F.2d at 1358 (defendant indicated that he and a woman were the only people who had driven the car during the preceding month).

On the other side of the coin, there was only weak evidence pointing to Mr. Daniels as a suspect. Mr. Daniels was not found with the car minutes after the robbery as in *Kraus* but *six days* later. While Mr. Daniels had picked up the car from impound the afternoon before the robbery, this was at least seven – and possibly more – hours before the robbery took place at 11:15 p.m. There was plenty of time for the other owner or some borrower – such as Mr. Hall – to take the car, with or without Mr. Daniels' permission.

There was also no description – at least of any significance – to match against Mr. Daniels. When initially interviewed by the police, the victim was able to give no description at all of the driver. *See* Exhibit E. In a later interview, the victim said the driver was dark complexioned, *see* Exhibit G, which Mr. Daniels is not. The description the victim gave at the preliminary hearing was about as general as a description can get – one man was perhaps described as shorter than the other. *See* Exhibit C, at 21. The, [sic] and when she later gave a description, she described him as While the victim did fail to exclude Mr. Daniels when shown his photograph, she also did not identify him and later testified at the preliminary hearing that she had not gotten a good enough look at the man to make an identification. Exhibit B, at 6. In sum, Mr. Daniels was only one of probably

thousands of men in the Los (Angeles area who fit the description given by the victim.

These facts are insufficient to establish probable cause when ownership of the car is joint and it is known that the car is on occasion loaned out to others. The arrest of Mr. Daniels was therefore unlawful, and his confession was subject to suppression as a fruit of this unlawful arrest, *see Taylor v. Alabama*, 457 U.S. 687, 691-92 (1982); *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975).

b. Mr. Daniels' attorney's failure to move to suppress the unconstitutionally obtained confession violated Mr. Daniels' right to effective assistance of counsel.

A direct Fourth Amendment challenge to a prior conviction cannot be made via a petition for writ of habeas corpus. *See Stone v. Powell*, 428 U.S. 465, 494-95 (1976). Failure to file a meritorious suppress motion in the absence of a reasonable strategic or tactical reason constitutes ineffective assistance of counsel which can be fully litigated in the habeas corpus context, however. *See Kimmelman v. Morrison*, 477 U.S. 635 (1986). The test to be applied is a two-pronged one – whether the failure to file a suppression motion "was unreasonable under prevailing professional norms and . . . not sound strategy" and whether the defendant was prejudiced by the failure to file the motion. *Id.* at 382 (*citing Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)).

The prejudice here is clear. The only evidence against Mr. Daniels was his confession, which followed the arrest so closely that it was clearly subject to suppression as a

fruit of the arrest if the arrest was found to be unlawful. Without that evidence, there would not even have been probable cause to hold Mr. Daniels to answer in Superior Court, let alone evidence sufficient to convict him at trial or convince him to plead guilty.

The failure to file the motion fell well below the reasonable standard of care, moreover. Most cases applying the test for ineffective assistance of counsel recognized by the Supreme Court in *Kimmelman v. Morrison*, *supra*, have focused on the merits of the Fourth Amendment claim. *See, e.g., Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1379 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.), *cert. denied*, 513 U.S. 1001 (1994); *Toomey v. Bunnell*, 898 F.2d 741, 744 (9th Cir. 1990). *But cf. United States v. Ouintero* [sic]-*Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995) (noting defense counsel's "oversight" and "uninformed judgment call" were not outside "the 'wide range of professionally competent assistance' " where district court "could have readily concluded" that stop was not pretextual). The Ninth Circuit has indicated that counsel generally should file a dispositive suppression motion if the motion is meritorious.

> This is not to say that a motion to suppress may be lightly dispensed with. Few things can more greatly benefit a criminal defendant than keeping the most probative evidence against him from being seen by the jury.

Lowry v. Lewis, 21 F.3d at 346. *See also United States v. Matos*, 905 F.2d 30, 33 (2d Cir. 1990). While it cannot always be said that "a defendant has 'everything to gain and nothing to lose' in filing a motion to suppress,"

Lowry, 21 F.3d at 346 (*quoting United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991)), it will be true in many, if not most, cases.

Mr. Daniels in particular had "everything to gain and nothing to lose." With suppression of the statement, the state would have had absolutely no case; without suppression of the statement, it had a damning case. And defense counsel here had a case – *People v. Herrera*, *supra* – in which the California Court of Appeals had expressly stated that ownership of a vehicle, *combined with other factors*, was "circumstances short of probable cause to arrest," *Herrera*, 52 Cal. App. 3d at 181.

Defense counsel should have filed the suppression motion, or at the very least advised Mr. Daniels of that option. Defense counsel's failure to do this constituted ineffective assistance, and Mr. Daniels' 1981 robbery conviction is constitutionally invalid for that reason.[6]

c. Mr. Daniels' lack of awareness of what the state had to prove to convict him on an aiding and abetting theory made his guilty plea invalid under the Due Process Clause.

As noted *supra* p. 9, a guilty plea is not intelligent and voluntary and violates the Due Process Clause if it is

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[6] Different counsel represented Mr. Daniels at the preliminary hearing, and, while suppression motions can be made under California law at that stage of the proceedings, there are legitimate tactical reasons for waiting. *See* M. Krause, *California Search and Seizure Practice* § 2.15 (CEB 1977). Only counsel in the Superior Court could be said to be ineffective, therefore.

entered by a defendant who is not aware of the nature of the offense, *i.e.*, the critical elements which the state must prove in order to convict him. As noted *supra* p. 8, Mr. Daniels does not know what is required in addition to prior knowledge and presence or association to prove guilt of aiding and abetting.

This makes the 1981 robbery conviction invalid for the same reasons that the 1978 robbery conviction is invalid, while the evidence was stronger in the 1981 case – if constitutionally obtained – the Supreme Court's analysis in *Henderson v. Morgan*, *supra*, makes this largely irrelevant. It does not matter if a defendant probably would have pled guilty anyway.

III.

CONCLUSION

Mr. Daniels' 1978 robbery conviction is constitutionally invalid because it was based on a guilty plea which was not intelligent and voluntary. Mr. Daniels' 1981 robbery conviction is constitutionally invalid because it also was based on a guilty plea which was not intelligent and voluntary and was the product of ineffective assistance of counsel – in the form of failing to file a dispositive suppression motion.

Because an Armed Career Criminal Act sentence could not have been imposed in the absence of Mr. Daniels, two robbery convictions, and because a sentence is constitutionally invalid to the extent is based on constitutionally invalid prior convictions, the sentence imposed

must be vacated. Mr. Daniels should be resentenced without the enhancement under the Armed Career Criminal Act.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: January 9, 1998 By /s/ Sylvia Torres-Guillen

SYLVIA TORRES-GUILLEN
Deputy Federal Public Defender

DECLARATION OF EARTHY D. Daniels

I, EARTHY D. Daniels, hereby declare and state:

1. I am the defendant in the above-entitled action.

2. I remember my 1978 robbery conviction. I was charged in that case with two other defendants – Maurice Timothy Smith and Richard Simes. I do not believe the prosecutor ever claimed that I actually participated in the robbery. I was arrested because I was in the car that Mr. Smith and Mr. Simes ran to when they tried to escape.

3. The prosecutor tried to get me to cooperate by testifying against Mr. Smith and Mr. Simes. He even offered me immunity for testifying. I did not want to testify against them, however, because Mr. Smith is my cousin and Mr. Simes was a friend.

4. Because I would not testify, the prosecutor would not give me immunity. I then pled guilty to the robbery charge. I knew a person could be convicted of robbery for just helping. In order to convict me this way, I thought the prosecutor would have to prove that I knew about the robbery beforehand and that I was in the car with Mr. Smith and Mr. Simes. I did not know the prosecutor would have to prove I actually helped or encouraged the robbery, and I did not know if the prosecutor would have to prove anything else.

5. The main thing I remember about my attorney in the 1978 robbery case is that he kept trying to talk me into agreeing to testify so that I could get immunity. As I say above, I would not agree to do that. My attorney never explained to me what the government would have to prove to convict me of helping with the robbery. If I had known the prosecutor would have to prove I actually helped or encouraged the robbery, I would not have pled guilty.

6. I also remember my robbery case in 1981. I was arrested about six days after the robbery while driving on the freeway near San Dimas.

7. I was driving the car. My passengers were a friend named Robert Hall and two white men whose names I now forget. My back tire blew out, and I pulled over to the side of the road. I got out of the car to check the tire, and a car pulled up behind me. A plainclothes officer then got out of the car and pointed his gun at me. He said something about two white guys having escaped from prison and had the other three men also get out of the car.

8. The California Highway Patrol then came up. I believe this was because the other officer called them. A Highway Patrol officer asked for my name and the names of my passengers. He called on the radio and apparently found out my car had been involved in the robbery, which had taken place about a week earlier. The Highway Patrol officers then arrested me and Mr. Hall and let the other men go. When I was turned over to the Inglewood Police Department, a detective interviewed me, and I confessed to being involved in the robbery.

9. I remember going to court for a preliminary hearing and being bound over to the Superior Court for a trial. I ended up pleading guilty because my attorney in the Superior Court advised me that that was the best thing to do. He never advised me that he could file a suppression motion challenging my arrest as illegal. If he had told me that he could file such a motion, I would have asked him to.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: January ___, 1998

_____
EARTHY D. DANIELS
Defendant

DECLARATION OF EARTHY D. DANIELS

I, EARTHY D. DANIELS, hereby declare and state:

1. I am the defendant in the above-entitled action.

2. I remember my 1978 robbery conviction. I was charged in that case with two other defendants – Maurice Timothy Smith and Richard Simes.

3. I do not believe the prosecutor ever claimed that I actually participated in the robbery. I was arrested because I was in the car that Mr. Smith and Mr. Simes ran to when they tried to escape.

4. The prosecutor tried to get me to cooperate by testifying against Mr. Smith and Mr. Simes. He even offered me immunity for testifying. I did not want to testify against them, however, because Mr. Smith was a friend and Mr. Simes was my brother-in-law.

5. Because I would not testify, the prosecutor would not give me immunity. I then pled guilty to the robbery charge. I knew a person could be convicted of robbery for just helping. In order to convict me this way, I thought the prosecutor would have to prove that I knew about the robbery beforehand and that I was in the car with Mr. Smith and Mr. Simes. I did not know the prosecutor would have to prove I actually helped or encouraged the robbery, and I did not know if the prosecutor would have to prove anything else.

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10. I remember going to court for a preliminary hearing and being bound over to the Superior Court for a trial. I ended up pleading guilty because my attorney in the Superior Court advised me that that way [sic] the best thing to do. He never advised me that he could file a

suppression motion challenging my arrest as illegal. If he had told me that he could file such a motion, I would have asked him to.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: December 9, 1997 /s/ Earthy Daniels
EARTHY D.
DANIELS
Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, Defendant.	)	CV 98-0420-WMB CR 93-1042-WMB ORDER DENYING 28 U.S.C. § 2255 PETITION (Filed Nov. 12, 1998)

I. BACKGROUND

On April 20, 1994, a jury convicted Earthy D. Daniels ("Daniels") on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Because Daniels had prior convictions in state court for robbery in 1978 and 1981 and for first-degree burglary in 1978 and 1979, Daniels met the career criminal definition of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). The Court sentenced Daniels under the enhancement statute to 176 months imprisonment, to be followed by a five-year term of supervised release, and a special assessment of $50.00.

Daniels appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that his prosecution under the enhancement statute violated the Double Jeopardy Clause and that his two prior burglary convictions did not constitute "violent felonies" under

the ACCA. The Ninth Circuit affirmed Daniels' conviction and sentence in an unpublished memorandum disposition. *United States v. Daniels*, No. 95-50044, 1996 WL 292231 (9th Cir. June 3, 1996).

Daniels then filed this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Daniels challenges his sentence on the ground that his two prior state robbery convictions, which were necessary to the imposition of an enhanced sentence under the ACCA, were unconstitutional. Daniels contends that his 1978 robbery conviction was unconstitutional because his guilty plea was not voluntarily given. Daniels contends that his 1981 robbery conviction was unconstitutional because his guilty plea was not voluntarily given and because his counsel was ineffective for failing to move for suppression of certain evidence.

II. DISCUSSION

The central question in this case is whether a federal prisoner can employ a 28 U.S.C. § 2255 motion to collaterally attack the constitutionality of an expired state conviction that was used to enhance his federal sentence. Consideration of this question must begin with *Maleng v. Cook*, 490 U.S. 488 (1989), in which the Supreme Court held that a defendant cannot launch a direct habeas challenge to an expired conviction, for which he is no longer "in custody," even when that conviction is later used for enhancement purposes. *Id.* at 492. Although the Court foreclosed direct habeas attacks on expired convictions, the Court expressly reserved the question of "the extent to which [an enhancing] conviction itself may be subject

to challenge in [a habeas] attack upon the . . . sentence which it was used to enhance." 490 U.S. at 494.

The Ninth Circuit faced this question in *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990). In 1976, Feldman had pled guilty in California state court to attempted extortion, burglary, and false imprisonment. Eight years later, a federal jury convicted Feldman of unarmed bank robbery, and the Court enhanced his sentence because of the prior conviction. Feldman filed a petition for habeas corpus under 28 U.S.C. § 2254, claiming that his expired state conviction was unconstitutional because it was based on a guilty plea that he was incompetent to enter. Because the court was, under *Maleng*, without jurisdiction to consider a direct attack on Feldman's 1976 conviction, the court construed Feldman's petition as an attack on his current federal sentence as enhanced by the allegedly unconstitutional state conviction. *Id.* at 1448-49.

The court did not acknowledge that this construction of Feldman's claim brought it face-to-face with the question left unanswered in *Maleng*. Rather, the court read *Maleng* to itself guarantee the ability to collaterally attack a prior conviction through a habeas challenge to a sentence enhanced thereby. Having construed Feldman's challenge to his expired state conviction as an attack on his enhanced federal sentence, the court simply stated that the district court should "consider and resolve Feldman's claim that the challenged conviction was improper." *Id.* at 1449.

Feldman appeared short-lived in light of the Supreme Court's decision four years later in *Custis v. United States*, 511 U.S. 485 (1994). In *Custis*, a federal defendant being

sentenced under the ACCA sought to attack the constitutionality of a prior state conviction that would result in a higher federal sentence. After determining that the ACCA did not itself authorize defendants to challenge the constitutionality of prior convictions used for enhancement purposes, the Court flatly rejected Custis' argument that such challenges were guaranteed by the Due Process Clause. Except where a defendant claims that a prior conviction was obtained in violation of the Sixth Amendment right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court found that collateral attacks on expired convictions were not authorized.

The Court offered three rationales for its holding in *Custis*. First, *Gideon* violations represent a unique constitutional defect which deprives a court of "jurisdiction," under a somewhat expansive reading of the term, while other alleged constitutional violations do not "rise[] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Custis*, 511 U.S. at 496. Second, a rule allowing collateral attacks based only on alleged *Gideon* violations would prove easy to administer, as the "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order." *Id.* Finally, and perhaps most importantly, the interest in promoting the finality of judgments weighed against recognizing a due process right to collaterally attack prior convictions simply because they are later used for enhancement purposes. *Id.* at 497. This interest was especially strong where, as in the present case, the prior conviction arose from a guilty plea. *Id.*

While *Custis* seemed to implicitly overrule *Feldman*, *Custis*, unlike *Feldman*, did not arise in the habeas context. Rather, Custis sought to challenge his prior conviction in the actual sentencing proceedings. Still, nothing in the Court's language limited its holding to collateral challenges brought at sentencing rather than on habeas. Indeed, the Court stated in rather general terms: "Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. We decline to do so." *Id.* at 496. And, as the Northern District of Illinois recognized in *Bernal v. Helman*, 958 F. Supp. 349 (N.D. Ill. 1997), the most reasonable interpretation of *Custis* is that its holding extends to the habeas context.

> It would make no sense to say that a federal court – and, by implication, a state court does violate the defendant's constitutional rights by using a defective conviction to enhance his sentence, but the defendant may only seek relief from this violation in a collateral proceeding to be commenced after the sentence has been imposed and in which he has no right to counsel. . . . The reasonable implication of *Custis* is that although the taint on the enhancing conviction is not excused, it is not fundamentally unfair to presume the prior conviction valid and put the burden on the defendant to have it expunged, and if it has not been expunged at the time of the subsequent sentencing it is not fundamentally unfair – or unconstitutional – to count it against the defendant.

Id., 958 F. Supp. at 355-56 (citation omitted).

Nonetheless, the Ninth Circuit has, on at least one occasion, read *Custis* as having presented no more than a "forum question." In *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994), the Ninth Circuit not only reaffirmed its *Feldman* holding but found that holding strengthened by the Supreme Court's intervening decision in *Custis*. Brock was a state prisoner who sought to challenge the constitutionality of a 1974 assault conviction later relied upon in state proceedings to civilly commit him in 1991 as a "sexually violent predator." Although Brock was no longer "in custody" under the prior conviction, the Court read *Custis* as supporting the availability of habeas relief, particularly where the very fact of incarceration for any period of time hinged on the prior conviction. "The Court's constitutional holding [in *Custis*] was . . . clearly premised on the fact that collateral attacks [on earlier convictions] may be heard on habeas review." *Id.* at 890.

This "forum" interpretation of *Custis* appears to rest largely on the *Brock* Court's reading of the last paragraph of that decision:

> We therefore hold that § 924(e) does not permit Custis to use the federal sentencing forum to gain review of his state conviction. Congress did not prescribe and the Constitution does not require such delay and protraction of the federal sentencing process. We recognize, however, as did the Court of Appeals, that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. *See Maleng v. Cook*. If Custis is successful in attacking these state sentences, he

> may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

511 U.S. at 497 (citations omitted) (emphasis added). The highlighted language does not suggest that a defendant can attack an enhancing conviction through a habeas challenge to his enhanced sentence. Rather, the Court was simply repeating the familiar rule that a defendant *who remains in custody* under a prior conviction, i.e., a defendant whose prior conviction has not yet expired, can launch a direct habeas attack on that conviction. Far from sanctioning collateral attacks on expired convictions, *Custis* suggests that the ability to challenge a conviction on non-*Gideon* grounds expires along with the conviction itself.[1]

More consistent with the language and logic of *Custis*, and more factually similar to the present case, is *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) (per curiam). In that case, the Ninth Circuit precluded a habeas petitioner from launching a collateral challenge to an enhancing conviction on non-*Gideon* grounds. The court took *Custis* at its word: "Following *Custis*, there is

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[1] Of course, the fact that Custis was still "in custody" under his state conviction, and that he could therefore attack that conviction through a direct habeas challenge, lessened the implications of disallowing such a challenge in a habeas attack on the enhanced sentence. Nonetheless, *Custis* contains no indication that the requirements of due process are any greater where the prior conviction has expired and is no longer subject to a direct habeas challenge.

no constitutional right to collaterally challenge the constitutionality of a prior conviction for any reason other than deprivation of the *Gideon* right to counsel." *Id.* at 809; *see also Entendencia v. Grabtree*, 980 F. Supp. 1172, 1175-76 (D. Haw. 1997). *Clawson* did not draw any distinction between collateral challenges made at sentencing and those brought by way of a habeas attack on an enhanced sentence. And, although *Clawson* never mentioned *Feldman* by name, the clear implication was that *Feldman* no longer remained good law.[2]

That *Clawson* should govern the Court's disposition of the present motion is especially clear following the Ninth Circuit's decision in *Contreras v. Schiltgen*, 151 F.3d 906 (9th Cir. 1998). In that case, Contreras sought to challenge, by a 28 U.S.C. § 2241 habeas petition, the constitutionality of an expired state conviction upon which his INS custody and eventual deportation were predicated. The Court read *Clawson* "to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner

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[2] At least two district courts have read *Clawson* as expressing no view on the right of a federal defendant to attack the constitutionality of a prior state conviction through a § 2255 challenge to a federal sentence enhanced thereby. *See Sanders v. United States*, 8 F. Supp. 2d 674, 678-79 (N.D. Ohio. 1998); *Bernal*, 958 F. Supp. at 357. This is not a proper reading of *Clawson*. *Clawson* was a § 2255 habeas case, not a direct appeal from a federal conviction and sentence, and Clawson's § 2255 motion attacked both the use of a non-final state conviction for enhancement purposes *and* the constitutionality of the state conviction itself. The second part of the *Clawson* opinion plainly bars collateral challenges to an expired conviction on habeas.

raises a *Gideon* claim," *id.* at 907, and affirmed the dismissal of Contreras' habeas petition. The court noted more generally: "When the federal proceeding its governed bar statutes [like the ACCA] that limit inquiry to the fact of conviction, there can be no collateral review of the validity of the underlying conviction except for *Gideon* claims." *Id.* at 908.[3]

Daniels' does not allege that his California convictions were obtained in violation of his *Gideon* right to counsel. Under *Custis*, as interpreted in *Clawson* and *Contreras*, Daniels is precluded from collaterally attacking his state robbery convictions on anything other than *Gideon* grounds. Accordingly, Daniels' enhanced federal sentence is constitutionally valid, and his motion to vacate, set aside, or correct that sentence must fail.

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[3] The *Contreras* Court noted that its decision "does not necessarily bear on the validity of our holding in [*Brock*], in which we permitted collateral review of an expired state conviction in a § 2254 habeas challenge to state civil confinement predicated thereon." 151 F.3d at 908. Because the present case involves a *federal* sentence enhanced by allegedly unconstitutional state convictions, *Clawson*, and not *Brock*, controls.

III. CONCLUSION

For the foregoing reasons, Daniels' 28 U.S.C. § 2255 motion is DENIED.

Date: Nov. 10, 1998

/s/ Wm. Matthew Byrne
Wm. Matthew Byrne, Jr.
United States District Judge

Supreme Court of the United States

No. 99-9136

Earthy D. Daniels, Jr.,

Petitioner

v.

United States

ON CONSIDERATION of the motion of petitioner for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

September 8, 2000